

The US Supreme Court's Activism in the Wisconsin Election

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2020-04-22T12:28:20

United States lawyers may wonder whether President Trump has captured its Supreme Court. One day before a presidential primary and local election in Wisconsin, the Court intervened in an extraordinary way to add a new voting restriction. The decision in [*Republican National Committee v. Democratic National Committee*](#) provides further evidence that the Court has abandoned its high court role in favor of unusual partisan interventions to effectuate results found congenial by its Republican majority. Furthermore, a Court usually sensitive to national security concerns reached its judgment about the Wisconsin election without taking the threat the coronavirus poses to democratic processes seriously.

This case arose out of a voting rights challenge to Wisconsin's decision to hold its election on April 7, in spite of an outbreak of the coronavirus that might well force citizens to relinquish their right to vote rather than risk death at the polls. The District Court declined to delay the election, but provided some relief by extending the deadline for receipt of absentee ballots from April 7 until April 13. In the wake of the coronavirus, the Wisconsin Board of Elections had received an extraordinary number of applications for absentee ballots and fallen far behind in sending out ballots. The District Court judge recognized that these delays would prevent many citizens who had met the application deadline from using the absentee ballots to vote. The deadline extension made it more likely that those who had applied for absentee ballots would be able to use them.

An emerging practice of shadow docket activism

This case looked like a poor candidate for Supreme Court review. The Supreme Court has, in the past, said that review of district court orders is rarely granted.

In recent years, however, the Court has moved away from traditional restraints on Supreme Court activism in cases important to the Trump administration. It has created a shadow docket that often relieves the Trump administration of temporary legal restraints on its policy initiatives when they appear illegal to District Courts. Trump's effort to deploy resources to build a wall on the border with Mexico in defiance of congressional wishes and dubious policies potentially imperiling the lives of asylum seekers have received this sort of solicitude. *Republican National Committee* extends this emerging practice of shadow docket activism on behalf of the President's initiatives to those of the Republican Party as a whole and accordingly generated a 5-4 split along party lines. The Court resolves shadow docket cases without full briefing or oral argument, which may make partisan views more likely to influence cases.

At the request of the Republican National Committee, the Court's Republican majority added a requirement that ballots due on April 13 under the District Court order must be mailed and postmarked by Election Day, April 7. The District Court had refused a Wisconsin State Board of election request to add a postmarking requirement, because it would interfere with the goal of the deadline extension – to enable voters getting ballots late to vote.

The Supreme Court's opinion suggests that the majority is protecting a state legal requirement from an overly activist District Court Judge. But the majority did not claim that the state law established any deadlines for postmarking a ballot.

The Court's decision obfuscates the record, displays arrogant disdain for the Federal District Court Judge who decided the case, and treats the plaintiffs in the case unfairly. The Republican majority identifies the plaintiff's failure to ask the Court to "allow ballots mailed and postmarked after Election Day to be counted" in its motion papers as "critical" to its judgment (Slip op. at 2). (The plaintiff had argued against the postmark requirement in oral argument.) But since there is no postmark requirement under state law there is no reason to ask for that. The postmark issue lies within the jurisdiction of the Supreme Court only because the Wisconsin Electoral Commission asked the District Court to *add* a post-election day postmark restriction in its response to plaintiff's request for an extension of the receipt deadline. By inventing a pleading requirement, the Court evaded the law requiring it to apply a deferential standard of review to District Court exercises of equitable discretion.

The Court also chastised the District Court for disrupting a pending election, while not seriously considering whether its own intervention would disrupt the election more severely than the District Court judgment had. In the wake of the Supreme Court's decision, voters had to risk their lives waiting on line for hours at polling places and thousands of voters lost their right to vote because they did not get absentee ballots in time to meet the last minute postmarking requirement.

Strategic Republican operatives in robes?

The conservative majority invents fresh, unclear, and baseless technical requirements for District Court Judges, while not applying the usual technical restraints on itself. Justice Ginsburg in dissent felt obliged to write that she "does not doubt the good faith of her colleagues", presumably because the reasoning and grant of review suggest bad faith. Maybe she is right. Maybe the Court's opinion and its decision to consider the stay motion reflect haste and time pressures, rather than a strategic effort to avoid restraints on its own review on behalf of the Republican Party. But to outside observers, a 5-4 decision in a case that did not merit Supreme Court review on specious grounds that distort the record, ignore the lower court's reasoning, and utterly fail to grapple with the Constitutional issues justifying its jurisdiction appears very partisan. The Court can best guard itself against unconscious partisanship or the appearance thereof by reestablishing its tradition of staying out of cases until they are thoroughly vetted in the lower cases and applying careful review of the record and lower court reasoning when it

reviews decisions. Unless the Court makes these changes, we have to conclude that Ginsburg has been too charitable, and that the majority of Justices are basically strategic Republican operatives in robes. The Wisconsin debacle and growing anxiety that Trump might use the coronavirus as an excuse to seek to postpone the presidential election has sparked a movement to make absentee ballots widely available in upcoming elections. An expansion of absentee balloting while making live voting compatible with social distancing, however, requires about \$4 billion in funding from Congress. Trump has said that expanded absentee balloting would be a disaster for Republicans. But rejecting this demand might give the opposition even more energy. The Democrats elected one of their own to the Wisconsin Supreme Court on April 7, despite, or perhaps because of, the chaos that followed the US Supreme Court's intervention.

